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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

:

APPELLEE,

:

CASE No. 20080706-CA

v.

:

JESUS ARGUMEDO- RODRIGUEZ,

:

(NOT INCARCERATED)

APPELLANT.

BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A JUDGMENT, SENTENCE AND COMMITMENT FOR DISARMING A PEACE OFFICE, A FIRST DEGREE FELONY IN VIOLATION OF UTAH CODE ANNOTATED SECTION 76-5-102.8, ENTERED IN THE THIRD DISTRICT COURT IN SALT LAKE COUNTY, STATE OF UTAH, BEFORE THE HONORABLE DINO HIMONAS.

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STATE OF UTAH,
:
Plaintiff/Appellee,
:
v.
:
JESUS ARGUMEDO-RODRIGUEZ, : CASE NO. 20080706-CA
:
Defendant/Appellant. (Not in Custody)
:

This Court has jurisdiction over this appeal from a criminal case involving a first degree felony pursuant Utah R. App. P. 42.

1. Whether the prosecution presented sufficient evidence to convict beyond a reasonable doubt.

When reviewing a bench trial for sufficiency of the evidence, this Court sustains the trial court's judgment unless it is 'against the clear weight of the evidence, or "if [we] otherwise reach[] a

definite and firm conviction that a mistake has been made.'" State v. Gordon, 2004 UT 2, ¶ 5, 84 P.3d 1167 (quoting State v. Goodman, 763 P.2d 786, 786-87 (Utah 1988) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987))).

This issue was preserved at the end of the prosecution's case in chief when the defense argued for dismissal based on insufficient evidence. R. 211, at 135-137.

2. Whether the trial court abused its discretion in ruling the defendant's expert could not render an opinion about the defendant's high level of intoxication and the effect of alcohol on his nervous system.

The determination as to who qualifies as an expert witness and the admissibility of the witness's testimony fall[s] within the discretion of the trial court. Absent a clear abuse of discretion," this Court "will not reverse the trial court's determination." In re G.B. 2002 UT App 270, ¶10, 53 P.3d 963.

"'The trial court has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard. Under this standard, this Court will not reverse [a decision to admit or exclude expert testimony] unless the decision exceeds the limits of reasonability.'" State v. Hollen, 2002 UT 35, ¶ 66, 44 P.3d 794 (quoting State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993)).

**STATEMENT OF THE CASE
NATURE OF THE CASE, COURSE OF PROCEEDINGS,
DISPOSITION**

The State initially charged Mr. Argumedo-Rodriguez by information with Disarming a Peace Officer, a First Degree Felony violation of Utah Code Ann. Section 76-5-102.8; Driving Under the Influence, a Class B violation of Utah Code Ann. Section 41-6a-502; Alcohol Restricted Driver Operating a Vehicle with Alcohol in the Body, a Class B Misdemeanor violation of Utah Code Ann. Section 41-6a-530; and Failure to Yield the Right of Way, a Class C violation of Utah Code Ann. Section 41-6a-902 (R. 01-03).

Following a preliminary hearing, the magistrate ordered Mr. Argumedo-Rodriguez bound over to the district court all of the charges. (R. 29, p. 26-28).

Argumedo-Rodriguez gave notice of his intent to assert a defense of not guilty by reason of diminished capacity to the first degree charge of disarming a peace officer by reason of his intoxication. R. 61-62. He subsequently gave notice of his expert witness along with the expert witness's resume. R. 67-79.

The State then filed a motion for the examination of Mr. Argumedo-Rodriguez as required by Utah Code Annotated Section 77-16(a)301. R. 80-82. The trial court granted the motion. R. 83-85. Argumedo-Rodriguez disclosed his expert psychology report to the prosecution on February 22, 2008. R. 91-92.

After the State failed to schedule Mr. Argumedo-Rodriguez's examination with its expert, Mr. Argumedo-Rodriguez stipulated to the State's motion for a second order for his examination pursuant to UCA 77-16a-301. R. 93-96.

When the State again failed to schedule the examination, Mr. Argumedo-Rodriguez filed his motion in limine to bar the State from using expert testimony in its case in chief and in rebuttal. R.

99-113. The State did not reply but instead filed a memorandum in support on motion in limine to prohibit defense from arguing diminished capacity and from calling expert. R. 176-184.

The record does not reflect whether the Court addressed the parties limine filings, however, at trial, the State objected to the testimony of the defense expert [R. 211, p. 137-140]. The Court reviewed the expert's report and but did rule on the objection. *Id.* The State argued against the expert's opinion being considered at the end of the expert's testimony. *Id.* at 155-157.

Following a two-day bench trial, Mr. Argumedo-Rodriguez conceded his guilt to Counts II, III and IV. The trial judge convicted him of the first degree violation in Count I. (R. 188). The trial judge handed down a sentence of five years to life on Count, 180 days on Count II, 90 days on Count III and also 90 days on Count IV. The trial court suspended the sentences and placed Mr. Argumedo-Rodriguez in jail for 180 days to be followed by 36 months of probation. R. 195-198.

STATEMENT OF FACTS

The following State of Facts is based primarily on evidence presented at trial. R 210 and 211.

1.- THE TRAFFIC INVESTIGATION, ARREST AND TRIAL.

A. DIRECT TESTIMONY OF OFFICER GARRETT MITCHELL OFFICER FRIER.

On July 15, 2006, at around 3:50 AM, West Valley City patrol officer Garrett Mitchell Officer Frier was driving southbound in the area along 6400 West and 4700 South in Salt Lake County. He observed a dark-colored, black pickup truck traveling in the opposite direction. The vehicle was traveling at a high rate of speed left of center, northbound, towards Officer Frier 's patrol vehicle and traveled through a stop sign. Officer Frier immediately turned around, Activated his emergency lights, overheard lights and his bright forward-facing light. The pickup truck pulled over. R. 210, pp. 9-12.

Officer Frier exited his patrol vehicle to make contact with the driver, Argumedo-Rodriguez, who was alone. Id. at 12.

After the initial contact, Officer Frier

observed a continuous odor of alcohol within the vehicle and an open bottle of beer. The odor of alcohol was coming from Argumedo-Rodriguez 's breath. Id. at 15-16.

Officer Frier requested Argumedo-Rodriguez produce his driver's license, registration and proof of insurance. Argumedo-Rodriguez was fumbling about and had a difficult producing his driver's license. At some point, Argumedo-Rodriguez had the driver's license in his hands, transferred it back and forth and continued to search in his vehicle for the requested documentation. When it appeared that Argumedo-Rodriguez was going to put the driver's license away, Officer Frier again requested that Argumendo hand the license to him. Id. at 16-17. Officer Frier then told Argumedo-Rodriguez "It appears you are having a difficult time." Id. at 17. Officer Frier also observed that Argumedo-Rodriguez had a glossy appearance in his eyes. His speech was slurred. His responses were slow, incomplete and in broken sentences. Based on his training and experience, he believed that Argumedo-Rodriguez was intoxicated. Id. at 18-19.

Officer Frier ordered Argumedo-Rodriguez to turn off his car and to give him the keys. Officer Frier returned to his patrol vehicle to check on

the license while Argumedo-Rodriguez remained in the pickup truck looking for the registration and insurance papers. Id.

Officer Frier requested officer back up to assist him. He confirmed the identity of Argumedo-Rodriguez and learned that Argumedo-Rodriguez was an alcohol restricted driver. Id. at 17-18. Some five minutes later, Officer Wimmer arrived on the scene as backup. Officer Frier briefed him on the situation and they decided to do some field sobriety tests. Id. at 19-20.

B. FIELD SOBRIETY TESTS AND LOSS OF BALANCE. OFFICER FRIER'S.

When Officer Frier returned to the pickup truck, Argumedo-Rodriguez was still thumbing through documents in his vehicle. Officer Frier requested Argumedo-Rodriguez exit the pickup truck. Because Argumedo-Rodriguez had a delayed response, Officer Frier opened the vehicle's door and assisted Argumedo-Rodriguez out of the vehicle. As Argumedo-Rodriguez exited the vehicle, he stumbled. Id. at 20.

Officer Frier then testified: "***At that point I knew I was going to then need to remain in close proximity and assist him...***" Id. at lines 23-25.

Officer Frier directed Argumedo-Rodriguez to perform three kind of field sobriety tests, the Horizontal Gaze Nystagmus (HGN), the Walk and Turn followed by the One Legged Stand. Argumedo-Rodriguez failed the HGN test. Id. at 23-25.

Officer Frier next proceeded to the One Legged Stand test, a test for balance, as Officer Frier explained, that requires the suspect to keep his hands to the side of the body, to keep his legs straight without bending the knees and to focus on the foot to be raised about six inches off the ground while counting one-one-thousand (1-1,000), two-one-thousand (2-1,000), three-one-thousand (3-1,000) and to continue counting until the officer orders the suspect to stop. Id. at 26-27.

Argumedo-Rodriguez "began counting wrong. He sat his foot down after six immediate attempts, losing his balance, I believe he raised his arms..., " testified Officer Frier. Id. at 28, lines 3-5. Argumedo-Rodriguez failed the test. Id.

For the last test, the Walk and Turn test, Argumedo-Rodriguez "had a difficulty maintaining his balance during the instructions...." Id. at 31, lines 1-2. "He started our counting I believe with No. 7.... He took fewer steps that he was supposed to. He stepped off line, placing his foot down to

the side to maintain his balance...." Id. at lines 14-20.

At this point Officer Frier determined that Argumedo-Rodriguez probably had a blood alcohol concentration greater than .08 and decided to take him in custody. He requested Argumedo-Rodriguez turn around and put his hands behind his back. Argumedo-Rodriguez did not comply, stating instead that he lived close by and asked the officers to take him home. Argumedo-Rodriguez was right in front of Officer Frier and Officer Wimmer was standing to the left. Argumedo-Rodriguez brought his arms up and implored the officers to "please take me home." Id. at 33-34. Argumedo-Rodriguez was holding his left hand up and gesturing, kind of pointing with is open hand off to his left. Id. lines 11-13.

The officers were standing very close to Argumedo-Rodriguez. Id. at 35. Officer Wimmer was standing even closer to Argumedo-Rodriguez. Id. at 35-36. Argumedo-Rodriguez continued begging the officers not to take him to jail. He continued to move his hands to the direction of his home. Id. at 36-37.

As he was bringing his hand down from pointing to the direction of his home, Officer Frier believed that Argumedo-Rodriguez made an attempt to

grab Officer Frier's gun, actually touching it. Id. at 37-38. While Officer Frier wrestled Argumedo-Rodriguez to the ground, Officer Wimmer kneed Argumedo-Rodriguez in the stomach area. Id. at 39. Because the officers sensed Argumedo-Rodriguez was resisting, Officer Wimmer punched him in the forehead. After the forehead punch, the Officers had total control of Argumedo-Rodriguez and Officer Frier successfully handcuffed him. Id.

After he was handcuffed, Argumedo-Rodriguez was crying in pain. He asked the officers why they hurt him. Officer Frier responded by asking him "why did you reach for my gun?" and Argumedo-Rodriguez replied "I know, and I just live close by. I want to go home." Something to that effect..." Id. at 40.

C. OFFICER FRIER'S CROSS EXAMINATION.

Officer Frier noted that Argumedo-Rodriguez had a slurred stuttering speech during the encounter and that he was under the influence of alcohol. R. 210, at 64. Argumedo-Rodriguez had glossy and red eyes. Id. at 65. His responses were delayed at times and rapid at other times. Id. Officer Frier believed at all times that

Argumedo-Rodriguez was under the influence of alcohol. Id. at 67, lines 11-16.

As Argumedo-Rodriguez stepped out of his car, Argumedo-Rodriguez's "knee buckled a little bit and he appeared to stumble. Id. at 69. Officer Frier testified to the following: Argumedo-Rodriguez "almost fell down." Id. at lines 24-25; Id. at 70, lines 4-8.

Officer Frier also testified that "he [Argumedo-Rodriguez] appears he was going to need assistance in keeping his balance." Id. at lines 11-12.

During the One Legged Stand test, Argumedo-Rodriguez could not keep his balance on one foot and he kept putting the other foot down because he was losing his balance. Id. at 74.

During the Walk and Turn test, Officer Frier had to walk along side Argumedo-Rodriguez to help him keep his balance. Id. at 74-75. Argumedo-Rodriguez nearly fell down while trying to do the Walk and Turn. Id. at 77, lines 5-6.

After the decision to arrest Argumedo-Rodriguez was made, Officer Frier was standing less than one foot from Argumedo-Rodriguez, facing him. Id. at 78.

Argumedo-Rodriguez was gesturing with his left hand while saying "I'm close to home, let me go"

all the while moving his feet. Id. 78, lines 10-25. See also p. 79, lines 4-14. ("he was pointing in that direction, back and forth... His hand was like this, and then it would come down like this, like I am almost home...")

Although Officer Frier testified that Argumedo-Rodriguez actually touched his gun, he conceded after reading his police report, that he [Officer Frier] was "able to stop him prior to his attempt to place his hand on my gun." Id. at 81, lines 18-19. See also, pp. 81-82, lines 8-21.

D. OFFICER CARL WIMMER'S DIRECT TESTIMONY.

Officer Wimmer testified that Argumedo-Rodriguez had a difficult time performing the One Legged Stand test. R. 211, at 101-102. Although Argumedo-Rodriguez lost his balance repeatedly, he did not completely fall over. When standing on one leg, Argumedo-Rodriguez would have to catch himself with the other foot to keep from falling down. Id. at 102.

Officer Wimmer also testified: "In addition, there was a time when he was standing on one foot, or attempting to stand on one foot, where I thought he might fall over, because his other foot was off the ground, so I put my hand forward to steady him

and make sure he wouldn't fall. He had a hard time standing on one foot." Id. at lines 7-14.

After the field sobriety test, Officer Frier told Argumedo-Rodriguez to turn around and put his hands behind his back. Argumedo-Rodriguez turned slightly to his left and looked over his shoulder. Officer Wimmer became nervous, he moved very close to Argumedo-Rodriguez. And then he moved even closer to him. At that point Argumedo-Rodriguez moved in quickly and close to Officer Frier and reached out and grabbed Officer Frier 's handgun. Id. at 102-103.

Since Officer Wimmer was close enough to the defendant, he administered a blow with his knee in Argumedo-Rodriguez's ribs and he punched him in the right eye. Id. at 103-104.

E. OFFICER CARL WIMMER'S CROSS-EXAMINATION TESTIMONY.

During the One Legged Stand test, Argumedo-Rodriguez had a very difficult time maintaining his balance. Several times during the testing, Officer Wimmer had to help Argumedo-Rodriguez maintain his balance. R. 211, at 111.

Officer Wimmer testified that he wrote in his report that **"Several times we had, we had to grab the subject by his arms to prevent him from falling**

over when he was doing a few of the tests." Id.
at lines 8-22. See also Id. at p. 114.

Argumedo-Rodriguez was extremely intoxicated.
Id. at 118.

F. TROOPER JACOB MATTHEW COX'S EXPERT TESTIMONY.¹

Alcohol is a central nervous system depressant, which means it slows down the function of the brain and the central nervous system. One of the first areas to be affected, clinically proven in studies, is a person's judgment, their logical thought, their reasoning. This impaired reasoning could even happen at even a lower than .08, even at .02 to the .04. The more research that is done, the more we are finding that judgment, logical thought.... is impaired at lower and lower level of BAC. R. 211, at 134.

Argumedo-Rodriguez Blood Alcohol Content (BAC)

¹. Trooper Cox was called to testify about the instruments used to measure Mr. Jesus Argumedo-Rodriguez's blood alcohol content. The state invited him to opine based on his training and experience about the physiological and mental effect of alcohol on a person who is intoxicated. R. 211 at 114. Mr. Argumedo-Rodriguez also relied on Trooper's Cox insights on the effects of alcohol on the men's retraction of Count I, intentionally disarming a peace officer.

was .177. R. 210, at 51.

G. DEFENSE EXPERT DR. JAMES POULTON'S TESTIMONY.

Defense expert James Poulton is a clinical psychologist who treats people with addiction to drugs, including alcohol and methamphetamine. R. 211, pp. 141-142.

To prepare to testify in the matter, Dr. Poulton reviewed the discovery including the police reports. He performed two and one half hours of clinical interviews with Argumedo-Rodriguez . Id. at 144. Dr. Poulton also conducted collateral interviews with Argumedo-Rodriguez 's ex-wife, business partner and his friend. Id. at 145. Dr. Poulton also gave Argumedo-Rodriguez the MMPI-II psychological. Id. at 149.

Dr. Poulton testified that, to a reasonable degree of medical certainty, Argumedo-Rodriguez was too intoxicated to form the intent to commit the crime of disarming a peace officer based on the facts of the case and his level of intoxication. Id. at 154.

2.- VERDICT AND SENTENCE.

The trial court convicted Mr. Argumedo-

Rodriguez of the First Degree offense of Disarming a Peace Officer. R. 211, pp. 170-175. Mr. Argumedo-Rodriguez had conceded guilt as to the other three counts. Id. at 169. The trial judge subsequently sentenced Argumedo-Rodriguez to a five years to life prison term on the Count One conviction that is at issue here, suspended the prison sentence but ordered Argumedo-Rodriguez to spend six months in jail followed by a probationary period of three (3) years among other conditions. Id. See Judgment, **Attachment A**.

Prior to sentencing, Officer Wimmer sent the trial judge an e-mail praising the judge for his verdict and offering to support the judge in the up-coming retention election.² R. 193-193a.

Argumedo-Rodriguez filed his Notice of Appeal on August 11, 2008. R. 204-205. **Attachment B**.

3.- CONVICTION CONSEQUENCES.

After serving his sentence, Mr. Argumedo-Rodriguez, a legal resident of the United States, was taken in custody by Immigration and Customs Enforcement agents and placed in deportation

². This writer does not know what weight to give to Officer Wimmer's congratulatory and endorsement e-mail to the trial judge.

proceedings because of the nature of his conviction, which is an aggravated felony. **Attachment C.** The immigration Court stayed the deportation proceedings because this appeal was timely filed.

SUMMARY OF THE ARGUMENTS

No reasonable trier of fact would have convicted Argumedo-Rodriguez under the facts of this case. The evidence was simply insufficient to convict. Officer Frier and Officer Wimmer testified that Argumedo-Rodriguez was so intoxicated that he struggled throughout the entire police encounter to maintain his balance.

Officer Frier and Officer Wimmer unequivocally testified and reported in their police reports written close to the time of the incident, and which they adopted at trial, that several times during the police encounter they had to help Argumedo-Rodriguez stay on his feet. They stressed they had to stay close to Argumedo-Rodriguez to help him maintain his balance. Officer Frier testified that moments before he believed that Argumedo-Rodriguez was reaching for Officer Frier's handgun, that Argumedo-Rodriguez was gesturing with his hand, raising it many times while telling

officers to let him go and pointing to the direction of his home. The clear weight of the evidence allows a finding of reasonable doubt that Argumedo-Rodriguez was losing his balance when the cops assumed he was reaching for Officer Frier's handgun.

Finally, the trial judge abused his discretion in rejecting Dr. Poulton's testimony on the grounds that Dr. Poulton was unqualified to testify and on foundation grounds. Dr. Poulton clearly was a qualified expert to testify about how alcohol affects a person's nervous system and how it affected Argumedo-Rodriguez at the time of the police encounter. Dr. Poulton's reliance on the police report was normal. His psychological assessment of Argumedo-Rodriguez to understand his psyche was on point. Additionally, the trial judge heard additional expert evidence from Trooper Cox, a prosecution witness, that alcohol consumption can affect a person judgment and voluntariness to perform an act even with blood alcohol content as low as .02 to .04.

ARGUMENTS

I

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO CONVICT BEYOND A REASONABLE DOUBT

The trial judge heard ample evidence that Argumedo-Rodriguez was extremely intoxicated and had a blood alcohol content of .177. The evidence of Argumedo-Rodriguez's inability to maintain his balance at the time of the police encounter is well-documented in the testimony heard at trial and in the depiction of the events in the police reports that the officers adopted at trial.

Officer Frier testified that he reported in his police report that he had to intervene to help Argumedo-Rodriguez maintain his balance from the moment after Officer Frier ordered Argumedo-Rodriguez to exit the pickup truck.

Officer Frier delivered the following testimony at trial,

Q. (By defense Counsel) He (Argumedo-Rodriguez) nearly fell down, and you had, according to your own writing, you grabbed his right arm to assist him so that he would not fall down in the roadway. Do you see that?

A. (Officer Frier). That is correct. And that's to the best of my recollection I believe that is what happened. He got out of the vehicle, and his knees did buckle, like I reported, I was concerned he was going to go on the roadway. In here I did write he almost fell down on the ground.

Q. It says he could not keep his balance. Do you see that?

A. It says that he appears he was going to need assistance in keeping his balance.

R. 210, p. 70.

After Argumedo-Rodriguez failed the HGN test, Officer Frier testified that during the One Legged Stand test, Argumedo-Rodriguez continued to have troubles with his balance, losing it several times. Id. at 28. Likewise, during the Walk and Turn test, Argumedo-Rodriguez could not maintain his balance.

Officer Frier further testified:

He had a difficulty maintaining his balance during the instructions, and was anxious...

He started counting I believe with No. 7. I can't recall exactly how many steps he took. I

documented it in my report. I don't have a copy with me. He took fewer steps than he was supposed to. And he stepped off line, placing his foot down to the side to maintain his balance.

Id. at 31, 73-74.

Throughout the Walk and Turn test, Argumedo-Rodriguez continued to evidence serious problem with his fine and gross motor skills. He could not maintain his balance.

Q. And you also testified that during this he lost his balance several times? Do you remember saying that?

A. (Officer Frier) Yes, I do remember saying that he failed the walk and turn test.

Id. at 74-75.

Q. And he nearly fell down a few times"

A. Yeah, he nearly fell down while he was performing the walk and turn.

Id. at 77.

The testimony of Officer Wimmer also

illustrated the utter state of intoxication of Argumedo-Rodriguez during the police encounter. Testifying about his observations of Argumedo-Rodriguez during the One-Legged Stand, Officer Wimmer explained:

Q. (By defense Counsel) Isn't it true that during the performance of that test the defendant had a very difficult time maintaining his balance?

A. (Officer Wimmer) Yes.

Q. Isn't true, Officer Wimmer, that several times you had to help him maintain his balance so he wouldn't fall?

A. I don't know if it was several times, but there was at least one time where, as he was standing on one foot, I did reach out and grab his shoulder.

R. 211, p. 111.

Q. You said you did observe the field sobriety tests throughout, all of them.

A. Yeah.

Q. And you do say that Jesus, which is Mr. Rodriguez, appeared to be extremely, your words, intoxicated that day?

A. Correct.

Q. And you wrote after that, "**Several times**

we had, we had to grab the subject by his arms to prevent him from falling over when he was doing a few of the tests." Do you see that?

A. Yes, sir, I do.

Q. The subject had an extremely hard time" – again used the word "extremely" – "hard time following the directions and instructions as given." Do you see that.

A. Yes.

Id. at 113.

Q. You guys (Officers) had to grab him for him to maintain his balance?

A. Yes.

Id. at 114.

While there is no doubt the arresting officers described an encounter with a drunk who exhibited very diminished motor skills due to extreme intoxication, the officers attempted to explain that Argumedo-Rodriguez 's deficient motor skills, his inability to maintain his balance were only issues that were present during the testing phase. However, no significant amount of time passed between the Walk and Turn tests where Officer

Wimmer testified that both he and Officer Frier had "to grab the subject to prevent him from falling over." In fact, it was immediately at the conclusion of the failed Walk and Turn test that the cops decided to take Argumedo-Rodriguez into custody. R. 210, at 32-33.

It is important to note here a critical discrepancy in the testimony of the officers regarding their respective physical position when they claim that Argumedo-Rodriguez intentionally went for the gun of Officer Frier .

Officer Wimmer testified:

...Officer Frier told the gentlemen to turn around and put his hands behind his back. At that point the subject, the defendant, turned slightly to his left, and looked over his left shoulder somewhat. That made me nervous. So I moved very close to the subject. I did not know if he was planning on running away or what the case may be. But it just made me nervous. So I moved closer to the subject. At that point, the defendant turned around quickly, moved in very quickly and close to Officer Frier, and reached out and, from my perspective, grabbed Officer Frier 's hand gun.

R. 211, at 102-103.

Officer Frier described the event in a manner that materially conflicts with Officer Wimmer's version. Officer Frier portrayed an Argumedo-Rodriguez that was moving a lot and gesturing a lot, mostly with his left hand, pointing toward where he believed was the direction of his home and asking the officers to not arrest him, to just take him home, all the while moving his hand. R. 210, at 32-37.

Most telling about the state of mind of Argumedo-Rodriguez that night was the exchange he had with the cops after he was kneed in the ribs and punched in the right eye. He asked the cops why did you hurt me? When the cops responded: "you grabbed for my handgun," Argumedo-Rodriguez replied: "I know. I am close to home."

The trial judge highlighted those words as a form of intent or as some form of confession. But the totality of the circumstances allow the reasonable inference that Argumedo-Rodriguez's response was that of a man who was so intoxicated that he could not even deliver a rational answer.

When reviewing a bench trial for sufficiency of the evidence, this Court "must sustain the trial court's judgment unless it is 'against the clear

weight of the evidence, or if [we] otherwise reach[] a definite and firm conviction that a mistake has been made.'" State v. Gordon, 2004 UT 2, quoting State v. Goodman, 763 P.2d 786, 786-787 (Utah 1988); State v. Walker, 743 P.2d 191, 193 (Utah 1987).

The clear weight of the evidence is against the verdict. Although hostile witnesses, Officer Frier and Officer Wimmer documented in their reports that Argumedo-Rodriguez did not have control of his movements. He displayed very poor motor skills. The police even had to stand close to him to prevent him from falling. They had to grab him to help him maintain his balance. It is reasonable under the circumstances to find that maybe Argumedo-Rodriguez lost his balance when he was gesturing about, as Officer Frier, testified and waving to an imaginary direction he assumed was his home. Argumedo-Rodriguez's very words to the query of the cops as to why he grabbed for the handgun further support the theory that he was not conscious of his judgment and body movements.

Even discounting the testimony of Dr. Poulton at this point, the trial judge still had the benefit of the expert testimony of Trooper Cox who testified for the prosecution and who energetically stressed that,

[A]lcohol is a central nervous system depressant, which means it slows down the function of the brain and the central nervous system. One of the first areas to be affected, clinically proven in studies, is a person's judgment, their logical thought, their reasoning.

R. 211, at 133-134. Trooper Cox also testified that,

....Clinical studies, more recent clinical studies have shown that becomes — is being impaired, I should say, from .02 to the .04 levels. The more research that is done, the more we are finding that judgment, logical thought, if you would, is impaired at lower and lower BAC's.

Id. at 134. Argumedo-Rodriguez had a BAC of .177. R. 210, at 51.

For the reasons analyzed in this argument, Mr. Argumedo-Rodriguez respectfully suggests this Court find that the verdict was against the weight of the evidence and should be set aside.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THAT THE DEFENSE EXPERT'S WAS NOT QUALIFIED AND DID NOT HAVE A FOUNDATION FOR HIS EXPERT OPINION

It is recognized that "Qualifications of a person as an expert witness. . . is in the discretion of the trial court." State v. Espinoza, 723 P.2d 420, 421 (Utah 1986); Dixon v. Stewart, 658 P.2d 591, 597 (Utah 1982).

"The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issue before it." Wessel v. Erickson Landscaping Co., 711 P.2d 250, 253 (Utah 1985). A person may be qualified to testify as an expert by virtue of experience and training, formal education is not necessarily required. Randle v. Allen, 862 P.2d 1329, 1337 (Utah 1993).

A. DR. POULTON'S QUALIFICATION AS AN EXPERT.

Prior to trial, Mr. Argumedo-Rodriguez gave notice of his intent to rely on the defense of diminished capacity. He timely disclosed the identity of his expert and followed up with a timely disclosure of the psychological report the expert had prepared on Argumedo-Rodriguez.

At trial, Dr. Poulton testified that he had undergraduate degrees in two disciplines, philosophy and psychology. He earned his graduate degree in philosophy from Brown University and his graduate degree in psychology from the University of Utah. He had been in private practice as a psychologist and also teaching at the University of Utah since 1986. He obtained his state license in 1987. R. 211, at 141.

As part of his practice, Dr. Poulton provides treatment for people who suffer from alcohol addiction. Dr. Poulton testified that treating people with alcohol addiction has been an ongoing part of his practice since he began practicing. Id. at 142.

In addition, Dr. Poulton works as a consultant for Odyssey House, which is a treatment unit for all kinds of addictions. He explained that although Odyssey House now concentrates in treating methamphetamine addiction, in the past it treated alcohol and cocaine addiction. Id.

As part of his duties with Odyssey House, Dr. Poulton supervised students who evaluate Odyssey House's patients. Dr. Poulton has supervised some 200 evaluations of Odyssey House's patients. Id.

Dr. Poulton also explained his method for treating people with alcohol problems. Id.

B. DR. POULTON'S FOUNDATION TO RENDER AN OPINION.

To prepare to testify in the matter and to render an opinion, Dr. Poulton studied all of the documentary evidence, including the police reports prepared by Officers Officer Frier and Officer Wimmer, the transcript of the preliminary hearing in which both officers testified. Id. at 144.

Dr. Poulton performed two and one half hours of clinical interviews with Argumedo-Rodriguez. The purpose of the interviews was to know Argumedo-Rodriguez as a person and to learn in specific details his actions on the day and night of the police encounter. Id. at 144-145.

Dr. Poulton also interviewed some people who knew Argumedo-Rodriguez, his ex-wife, his business partner and one of his friends to get a better perspective of who Argumedo-Rodriguez was. Id. at 145. Dr. Poulton studied Argumedo-Rodriguez's entire background, from his birth in Mexico, his migration into this country, to his work ethics, his ability as a father and his propensity for violence. Id. 144-149.

After laying the preceding foundation, Argumedo-Rodriguez's counsel asked Dr. Poulton about his findings based on the interviews with Argumedo-Rodriguez, the collateral interviews and

his studying the police report. Dr. Poulton opined that Argumedo-Rodriguez was extremely intoxicated during the police encounters. Id. at 150.

The prosecution objected to this findings and the trial judge overruled the objection at this point. Id. at 150-151.

Dr. Poulton opined that Argumedo-Rodriguez had extreme difficulties with his motor functioning as a result of the intoxication. He had difficulty with both his fine motor and gross motor control Id. at 151.

Again the prosecutor objected to the opinion and the trial judge overruled the objection.

Dr. Poulton also gave Argumedo-Rodriguez the MMPI-test to assess his predisposition for violence. Id. at 152-153. The prosecution objected to consideration of the test result and the judge rejected the finding from the MMPI-II test. Id. at 153. Like wise, the trial judge rejected any consideration of Argumedo-Rodriguez's past conduct or history and ruled:

...This is not what this witness should be testifying about. I am not going to have a witness take the stand and testify to whether he is guilty or not guilty based on his propensity to commit crime. **Limit it to whether he was so**

intoxicated that he could not form a mental state....

Id. at 154.

C. DR. POULTON EXPERT OPINION.

Immediately after the trial judge ruling, defense counsel asked Dr. Poulton:

Q: (By Mr. De Montreux) Dr. Poulton, as a result of your evaluation of Mr. Rodriguez, have you formed an opinion, to a reasonable degree of medical certainty, as to whether Mr. Rodriguez on July 15, 2006, was able to deliberately premeditate his conduct.

A: Yes, I have

Q: What is it?

A: My opinion is that he was so intoxicated that he was unable to bet his body to follow through with any intent that he formed, and that is indicated by the police report, by his own report. Consequently --- and there are several instances of that, that I can point to as evidence. When he got out of the car he fell. The reason he fell is although he was wanting to get out of the car and intending to get out of

the car, he couldn't make his body move in the correct way, to follow through with that intent. That even happened within just a couple of minutes prior to the alleged offense. I think that, given that he was unable to make his body move in a gross motor movement like that, he was also just a couple of minutes later unable to make his body move with the intent of wrestling the gun away from the officer.

Id. at 154-155.

D. OBJECTION TO THE OPINION, VOIR DIRE AND NEGATIVE RULING.

The prosecution objected to the opinion on ground of hearsay and requested to conduct a voir dire. The judge denied the hearsay objection and allowed the voir dire. Id. at 155.

The prosecutor concentrated his voir dire on whether Dr. Poulton was present at the scene during the police encounter and whether Dr. Poulton had specific knowledge of how much alcohol Argumedo-Rodriguez had ingested and what his current level of intoxication was when he was interacting with the police. Id. at 155-156.

The prosecutor also asked whether Dr. Poulton had training in psychology and whether Dr. Poulton

had training with regards to the physiological effects of things like alcohol and other substances to which Dr. Poulton replied that as a matter of course, psychologists continually get training on the physiological effects of things like alcohol and other substances. Id. at 156.

The Prosecutor further asked whether Dr. Poulton conducted tests on Argumedo-Rodriguez to determine his level of intoxication on July 15, 2006 at about 3:50 AM. Id. at 157.

The trial judge sustain the objections specifically ruling:

As to qualifications and foundation, I sustained the objection. As to hearsay, I overrule the objection...

...as to hearsay, Mr. Burmester seems set on suggesting an expert witness cannot rely on hearsay, which I am taking as hearsay that an expert in the field would typically rely on, for example conversation with their client in forming their opinion. That objection is not well taken. But as to the objection that the expert has not been qualified to render the opinion you have asked for, sustained. As to the objection that foundation is improper or insufficient at this

time, sustained.

Id. at 157-158.

The trial judge heard ample evidence about Dr. Poulton's qualifications as a psychologist who has provided treatment for alcohol addiction for over 20 years, since 1986. He heard that Dr. Poulton is a consultant with a major and reputable treatment entity, Odyssey House, and that he supervises psychology students who evaluate addicts at Odyssey House and that he has supervised some 200 evaluations. The judge heard testimony that Dr. Poulton spent considerable time with Argumedo-Rodriguez in clinical interviews, and that Dr. Poulton examined the police reports that detailed the events of the police encounter.

It is bizarre to suggest that Dr. Poulton could have performed specific testing to demonstrate Argumedo-Rodriguez's level of intoxication on July 15, 2006 at 3:50 in the morning as the prosecutor argued. Certainly, Dr. Poulton could not have been expected to get Argumedo-Rodriguez drunk to reach the BAC of .177 that he produced on the day of the police encounter.

Dr. Poulton testified as required by Utah Rules of Evidence 702 that provides that "a witness

qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." See also Robb v. Anderson, 863 P.2d 1322, 1326 (Utah Ct. App. 1993).

The prosecutor did not challenge Dr. Poulton's qualifications in his voir dire. On the qualifications issue, the prosecutor asked: "And your training is in psychology, is that correct?" To which Dr. Poulton replied: "Clinical Psychology, yes." Id. at 156, lines 16-18.

The prosecutor also asked about Dr. Poulton's training in all of one question. He asked: "What is your training, if any, with regards to the physiological effects of things like alcohol and other substances?" Dr. Poulton replied: "Psychologists continually get training on the effects of things like alcohol and other substances." Id. lines 19-23.

The prosecutor's did not challenge either Dr. Poulton's qualifications or his training in the voir dire. The prosecutor did not even challenge Dr. Poulton's conclusions. He just argued or suggested that Dr. Poulton perhaps should have done more than interview the defendant about the facts surrounding the police encounter, research his background and study the police reports. The

prosecution appeared to suggest that Dr. Poulton could not render an opinion or was not qualified because Dr. Poulton was not on the scene during the police encounter and relied upon hearsay. The prosecutor also appeared to suggest that Dr. Poulton should have performed specific laboratory tests on Argumedo-Rodriguez to determine his mental state to commit the offense at the specific time the alleged offense occurred.

Dr. Poulton's credentials qualified him to testify and more than sufficient foundation was laid for Dr. Poulton's testimony. Even the trial judge recognized that an expert can rely on hearsay to form an opinion. Therefore, Mr. Argumedo-Rodriguez respectfully argues that the ruling to reject Dr. Poulton's opinion on qualifications and foundation grounds appears arbitrary and capricious, and constitutes an abuse of discretion.

For the reasons analyzed in this argument, Mr. Argumedo-Rodriguez respectfully suggests this Court reverse his conviction.

CONCLUSION

The evidence presented at trial was insufficient to support the verdict. A reasonable trier of fact would have found reasonable doubt

under the circumstances of the case. The evidence depicted a defendant with a .177 blood alcohol content that more than the double the impaired limit. The defendant had no control over either fine motor or gross motor functioning. The State's own expert testified that alcohol is a nervous system depressant that slows down the function of the brain and the central nervous system and affect a person's judgment, logical thought and reasoning. The offense at issue required the central element of specific intent crime. The evidence negates specific intent.

Mr. Argumedo-Rodriguez respectfully urges this court to find abuse of discretion in the decision to reject the expert testimony of Dr. Poulton on qualifications and foundational grounds. Dr. Poulton definitely qualified to render an opinion in the matter and more than sufficient foundation was laid.

DATED this 25th day of February, 2009.

/s/Bel-Ami de Montreux
Bel-Ami de Montreux
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing on February 25, 2009, to:

/s/Bel-Ami de Montreux
Bel-Ami de Montreux
Attorney for Defendant/Appellant

ATTACHMENT A

ATTACHMENT B

ATTACHMENT C